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ABSTRACT

A strong case can be made that the study of law, properly conceived as a resource to enrich civics as a branch of social science, is the broader study of the role of law in the social order. Study about law provides a unique opportunity for: (1) addressing what has historically been a neglected, pervasive daily influence on us all; (2) analyzing important humanistic notions that are especially law related; (3) enhancing a sense of, and capacity for, civic efficacy; (4) enriching other civics-related disciplines; and (5) sharpening certain intellectual skills. The legal content for a more effective civics curriculum should contain materials about law, not necessarily the study of particular laws. It should be studied in the context of the social necessity of law, with the realization that law is more than mere rules. The functions of the legal system should be investigated as to the variety of legal mechanisms or tools within society. The evaluation of legal processes should be qualitative, and not rest solely on the outcomes of the legal processes, but on those processes themselves. A realistic understanding of the law's capacity and limits, when combined with a positive skepticism born of an informed understanding, will result in today's students having the necessary skills to effectively cope with the issues of citizenship in the 21st Century. (PPB)

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CITIZENSHIP FOR THE 21ST CENTURY

Legal Content in the Civics Curriculum

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CITIZENSHIP FOR THE 21ST CENTURY

LEGAL CONTENT IN THE CIVICS CURRICULUM

A. Bruce Campbell

I. Introduction: Defining the Subject -- "About Law"

Before making any case for enriching secondary level civics education with learnings from the discipline of law, some definitional matters should be addressed. When speaking of "law" as a proper subject for liberal education in the humanities, of what does one speak? Ask this question of several educators, and the answers are likely to be varied. "Law" is teaching about the Constitution, in particular the Bill of Rights; crimes and why criminal laws should be obeyed; legal rules applicable to landlords and tenants, borrowers and lenders, purchasers and sellers; or important contemporary law-related social issues such as the threatened environment, women's rights, and drug abuse.

A distinct case can be made for law-related education with each of the above focuses. Indeed, pioneering educators and concerned lawyers over the past twenty-five years have developed a great number of secondary social studies curriculum materials

that focus on areas like these.[1/] Clearly the better materials in each of these areas offer something to general education, from a better understanding of what the U.S. Constitution says and citizens' rights thereunder to basic first aid for the consumer.

Such narrow or specialized focuses for legal studies in civics education do not, however, begin to realize law's potential for enriching this social science. Webster tells us civics is,

> "a social science dealing with rights and duties of citizens."

In turn, social science is defined as that branch of science dealing with the "institutions and functioning of human society and with human relationships as members of society."

Thus, a strong case can be made that the study of law, properly conceived as a resource to enrich civics as a branch of social science, is the broader study of law's role in the social order. It is the study of how law affects individuals and their relationships as members of society. The focus broadens from the Constitution, crimes, legal first aid or legal aspects of particular social issues. It shifts from the study of laws and

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1/ Ten years ago the Social Science Education Consortium in Boulder, Colorado, cataloged in a single sourcebook some 90 sets of classroom materials for K-12 levels. These are classified in six categories identified as role of law in society; social concepts related to law; constitutional law and civil rights; criminal law and the criminal justice system; contemporary issues related to law; and substantive law subjects (e.g. torts, contracts). Handbook of Legal Education Resources, Social Science Education Consortium, edited by M.J. Turner, Boulder, Colorado (1977).

legal issues to study about law and legal processes as social ordering resources: law's nature, its social functions, its limits, its interrelation with other social ordering resources and with social change. The end is not learning what given constitutional, or criminal or consumer laws say. It is instead learning such things as what law is, what it does, how it does it, why it does not always accomplish objectives held for it, and how it can be intelligently criticized and improved.

"Law," thus conceived for general education, can be an important part of civics education in enhancing the humanistic dimension of this social science. In an article entitled "Law, Science and Humanism," Harry Kalvin and Hans Ziesel note,

> "Humanism appears to involve at least two related notions: respect for human values, notably those of dignity and individuality, and a concern for the aesthetic side of life, as reflected in art and literature. In both these senses the law is deeply humanistic."[2/]

If the humanities are, in fact, at least in part the study and promotion of respect for human values ("notably ... dignity and individuality"), law is an apt part of that study. Professor Robert Summers points out in making the case for law in general education that at least seven common uses societies make of law demonstrate the importance of law in facilitating

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2/ This article is found in The Humanist Frame (Huxley ed.) Unwin Bros. Ltd. (1961) p. 331 and is extracted in the general introduction of Summers, R.S. and Howard, C.G., Law: Its Nature, Functions and Limits, p. 2, Prentice Hall, Inc. (2nd ed. 1972).

individual self-realization: providing health, including a healthful environment; reinforcing the family and protecting privacy; keeping order; securing individual freedoms; minimizing unjust inequalities of opportunity; enhancing reliability of exchange relationships; and promoting private ownership.[3/]

The case for the humanistic study about law and legal processes as the appropriate and most effective means of the legal discipline contributing to the future of civics education is succinctly put by an eminent legal/educational scholar and by a farsighted American political leader.

> "Law is probably the most neglected phase of our culture in the liberal arts curriculum."
> Paul A. Freund

> "We need laymen who understand the necessity for law and the right uses of it."
> Woodrow Wilson

II. The Justification for Study "About Law" in Civics Education

The most enlightened approach to law for liberal education starts from the premises that the proper focus is study about law -- where and how it fits in the social order. In lieu of learning the content of laws as an educational end in itself, the best of what the discipline of law has to offer for the social science of civics is study about law's nature, its functions and its limits.

[3/] Id. at 16.

Before suggesting particular "about law" content or concepts, it is useful to frame that content and these concepts in identifying what it is about law that potentially enriches traditional civics education. There are at least five important justifications for bringing law into civics education -- five distinct ways that study about law and legal process enriches general education about the society in which we live and the individual's role in that social order. Study about law provides a unique opportunity for (1) addressing what has historically been a neglected, pervasive daily influence on us all; (2) analyzing important humanistic notions that are especially law-related; (3) enhancing a sense of, and capacity for, civic efficacy; (4) enriching other civics-related disciplines; and (5) sharpening certain intellectual skills.

A. Understanding a Part of the Social Order that Effects Everyone Every Day

The alarm clock sounds and it is 6:00 a.m. according to the standard time established by law. Our high school student sheds her night shirt which, as required by law, is flame retardant. She brushes her teeth and showers in water that meets the purity regulations established by local town ordinances. After getting the paper and milk from the front porch, which were delivered pursuant to legal agreements with the local newspaper and dairy, our subject eats her corn flakes from a box complying with legally fixed weights and measures and which was purchased with legal tender. After a ride in a legally

licensed school bus with a legally licensed driver who followed the legal rules of the road which were built with tax dollars that were raised and spent according to law, our young citizen arrives at school. Here she confronts more legally licensed professionals, operating under legally binding contracts who will address with her a legally sanctioned curriculum. She has been out of bed less than two hours and our target of civics education has had more than a dozen brushes with the law (none of them, incidentally, with the criminal law).

A subject that is so much a part of our everyday social behavior should not be left out of general education if an objective of that education is to understand the society in which we function.

The late Harvard Professor Hocking once commented:

> "Studying social studies without law, is like studying vertebrate anatomy without the backbone."

It makes no more sense to leave to the lawyers the general study of the subject of law's role in society than it makes sense to leave the study of arithmetic to the mathematicians. Professor Summers points out that addressing law's application to everyday activities not only reveals basics about law's nature and

functions, but also serves to dispel many widespread misconceptions about law, for example, that law is essentially restrictive rather than facilitative.[4/]

B. Treating Key Humanistic Notions

Studying the law at work in society involves judging between competing claims and values in real life situations. It involves trying to understand processes of balancing between following fixed rules and exercising sound discretion. These exercises are unusually well suited for sharpening students' sense of justice and capacity for responsible judgment. More than twenty years ago, in making the case to the legal academic establishment for integrating law studies into liberal, humanities studies, Professor Summers argued that important social values of liberty and equality are most effectively studied through the medium of primary source materials of Law. Here students see concretely what is at stake and are induced to empathize, and so to internalize, important humanistic notions.[5/]

[4/] In the introductory materials in the second edition of Law: Its Nature, Functions and Limits, Professor Summers identifies no fewer than thirty-one "Common Fallacies About Law." This list itself is a succinct inventory of understandings about law's nature, functions and limits.

[5/] Robert S. Summers, unpublished Memorandum to Members of the Association of American Law Schools (June, 1967).

C. Fostering Civic Efficacy

Justice Brandeis once noted,

> "Those who won our independence believed . . . that the greatest menance to freedom is an inert people."

Two of the pioneers of modern efforts to bring study about law to general secondary education have supported those efforts by the reason, among others, that understanding law's role in society is essential to stimulating the active involvement of individual, private citizens that is necessary for the legal system to work effectively in a free society. Professor Harold Berman in his seminal modern work, On The Teaching of Law in the Liberal Arts Curriculum, noted, in 1956, that the study of law is an important foundation in the training of students for the responsibilities of social, economic and political activity. Robert Summers in his early appeal to legal educators argued that study about law in general education is necessary to foster understanding of citizen's roles in the operation of government and to stimulate citizen participation in legal and political processes.[6/] As so concisely put in the promotional brochure for this very Conference:

> "The future of our democracy depends on educating citizens to participate actively and intelligently as voters and political activists, workers, consumers, savers/investors, and volunteers."

6/ Id.

Citizens need a rudimentary understanding of such matters as what law is; how it works; what law reasonably can be expected to accomplish; how it can be responsibly evaluated and criticized; and how it changes and relates to social changes. Without this, it is unrealistic to expect the populace to assume the active, positive, constructive and critical roles that are part of a healthy functioning democratic "government of laws."

If fundamental liberties are to be preserved, private citizens must actively exercise their legally protected constitutional rights. Furthermore, certain implements of the legal system only work at all as initiatives of private citizens. Those who want improvement of the social order through orderly change must be willing and able to engage actively in processes of legal change. However, if civics education does not tackle study about law, students' approach to law is not likely to be one of constructive, positive activism. It is more likely to be one fraught with misunderstanding, unrealistic expectations, and intimidation.

Our traditional approach to civics, ignoring basic inquiry about what law is and how it operates, invites frustration, alienation, apathy and cynicism when dealing with "the system." These are the very antithesis of the attitudes in the citizenry that are essential for the viable operation of law in a free society.

D. Enriching Other Civics-Related Disciplines

The case for law in general civics education was early suggested by the argument that other disciplines which are rich components of effective civics education are themselves rich in legal content. John Appel in a 1958 piece advocating integration of law study into social science at the undergraduate level notes,

> ". . .Understanding of social sciences . . . cannot possibly be divorced from an understanding of legal systems. . . . The students of history, economics, political science, psychology, sociology and allied fields must consider the legal order, and particularly legal institutions, and often the nature of legal analysis, in order to see their special fields in the perspective essential to a true liberal education.
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> . . . . [T]he student of political science who studies constitutional law is enabled (or perhaps forced) to consider the historical, economic, social and philosophical aspects of his own discipline -- and the same holds true for a student in any department of the liberal arts curriculum. . . ."[7/]

E. Sharpening Intellectual Skills

A final justification that has traditionally been offered for bringing study about law to general social science and civics education concerns intellectual skills that the study of law may foster. Professor Paul A. Freund in a landmark article on the subject of law for liberal education stresses the

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7/ Appel, J.D., "Law as a Social Science in the Undergraduate Curriculum," 10, J. Legal Education pp. 486-87 (1958) (extracted in Summers, supra, at p. 3).

potential of legal materials for developing the intellectual powers of students.[8/] Freund cites and explains how seven important intellectual modes of thought may be cultivated through immersion in the problems and literature of the law. These modes of thought he identifies as dialectical thinking, contextual thinking, ethical thinking, genetic thinking, associative thinking, institutional thinking and self-critical thinking.

Professor Summers adds an eighth intellectual mode of thought to be found in studies about law -- process evaluative thinking. The study of processes of making and employing laws affords a rich opportunity for qualitatively evaluating the means for implementing social policy.[9/] Summers notes that traditional studies of policy sciences tend to divorce artificially the analysis of social ends from the analysis of social means, thereby rejecting the important study of the qualitative evaluation of social processes on the basis of criteria apart from the ends the processes are apt to produce.[10/]

More than three decades ago, one of the early leaders of the movement for bringing studies about law to general social science education summarized justifications for this in the Report that initiated this modern (albeit, modest) movement:

8/ Freund, Paul A., "The Law and the Schools," 36 Harvard Ed. Rev. 470 (1966).

9/ Summers Memo to AALS membership, supra note 5.

10/ See Section III.C below.

The study of law -- not as a matter of professional training but as a matter of humane, or liberal, education -- can enrich the minds of students of the arts and sciences in at least three principal ways.

First, it can have a value for their general education a) by helping them to understand the relation of order to disorder in human experience, b) by exposing to them a method of reasoning different from that which is generally used in the social and natural sciences, a method of reasoning adapted to the reaching of decisions for action, and c) by making them aware of law as one of the great freedom-creating traditions of Western thought and action.

Second, it can have a scholarly value for them by filling in important gaps in their knowledge now left by omission of legal materials and by giving them important insights into the subject matter of other disciplines; it can help students of government, for example, to grasp more fully the underlying premises of American politics and of international relations; it can help students of philosophy to understand better such matters as the nature of inductive and deductive reasoning and the relation of ends to means; also it can enrich education in history, sociology, and other branches of learning. At the same time, education of social scientists in law can play an important part in enriching legal scholarship.

Third, law study can have a moral and intellectual value for students of the arts and sciences by helping them to develop a sense of justice and a capacity for responsible judgment; that is, in studying the factors which enter into the reaching of legal decisions and the making of legal rules, the student's own intellectual responsibility, and his moral capacity to judge between competing claims and to strike a proper balance between rule and discretion can be enlarged.[11/]

11/ Berman, H. J., On the Teaching of Law in the Liberal Arts Curriculum, p. 17 (1956).

III. Legal Content for a More Effective Civics Curriculum

Returning to the premise: it is not the study of the content of particular laws, as such, but study about law, its nature, functions, limits and role in society that is the proper focus to enhance civics education. With that premise, what are the most important and fundamental concepts or learnings that are likely to foster through civics education students who will be more effective participating citizens of tomorrow? What subjects about law and legal processes will most effectively impart knowledge, skills and attitudes required to function as effective citizens?

In the following pages four main topics are considered:

- Law as a Social Necessity
- How Law Works
- Evaluating Legal Processes
- Limits of Law

Treatment of each of these topics starts with a statement of a fundamental concept or learning about law or legal processes. This is followed by a brief explanation of that concept and argument in support of its inclusion in the legal dimension of the civics curriculum. Then a number of illustrative sub-concepts are treated. These too are learnings about the nature, functions and limits of law and law's role in the social order.

The four main learnings about law that are treated are by no means offered as an exhaustive inventory. Many other fundamental concepts about law and legal processes could similarly enrich civic's studies. In fact, a number of other recurrent themes or learnings that surface in the four topics are identified at the conclusion of the paper.

A. Law as a Social Necessity

ESSENTIAL FUNCTIONS LAW PERFORMS MAKE LAW NECESSARY IN SOCIETY AS WE KNOW IT

In our complex society legal rules and procedures provide an accepted means for resolving private disputes when private parties are unable to resolve them. Law supplies guidance and regulation of many wholesome activities that would be dangerous, inefficient or just plain chaotic without such guidance. Laws officially define and discourage by punishment certain unacceptable, antisocial conduct. A special kind of laws ("constitutional laws") protect basic freedoms by defining, limiting, and restraining powers of officials. Because of the nature of people and societies, law is essential to do certain jobs like these.

In considering the necessity for law by studying it at work performing such essential functions, civics students may learn a great deal about the nature of law as well as about its functions. They will see law is essential in society, not merely incidental. They will see law operating primarily in a

facilitative, rather than restrictive, role. They will observe that laws and legal processes can be employed soundly or foolishly, and often it is the wisdom of the people employing law that determines which.

Observing law at work on such essential social functions also affords the student the opportunity to learn something about the nature of society, something about the critical roles public officials and private individuals play in the operation of law, and something about the connection between law and important social values such as liberty, fairness, order and safety. After examining law at work on necessary social functions, students should understand that the legal system is more than mere rules; it is rules, processes, officials, private individuals and official sanctions.

Law is Necessary To Provide Rules and Processes for Resolving Disputes Fairly and Rationally

When people live in proximity to one another, disputes occur. It is their nature. Sometimes people of ill will cause disputes. As often, disputes are between people of good will. Such people have good faith disagreements over the facts underlying a given dispute (e.g., whose car crossed the double line; what were the terms of the verbal agreement?). They disagree over interpretation of the applicable rules (was the conduct negligent under the circumstances?). Even where there is no contest over interpretation of rules, people often have good

faith disputes over which rules are applicable (should the rules for binding contracts apply to an agreement between teenagers?). Dispute resolution may involve finding facts, deciding what rules should apply, interpreting rules as they apply to specific facts, and fashioning a result or remedy once it is decided who should prevail.

There are many different kinds of disputes that come about as people live together: disputes between family or church members; disputes over accidents; disputes over property; disputes over agreements; and even disputes over the way public officials do their jobs. Some of these disputes are far more suited to legal resolution than others.

There are many different procedures for resolving disputes, ranging from coin flipping, to fighting, to voting, to turning the dispute over to a third party (like a court). Students should consider why it is unsatisfactory simply to leave some disputes unresolved. They can evaluate different dispute resolution processes and identify what distinguishes going to court from other procedures for dispute resolution. They should isolate the special characteristics of good processes for dispute resolution and relate these characteristics to the judicial process.

Law Is Necessary to Regulate, Guide and Coordinate Much Social Interaction

When large numbers of people come together to live in complex societies, they are a threat to one another unless they have effective standards to guide or coordinate many kinds of wholesome, routine activity. Such standards need a certain amount of uniformity and the support of official sanctions for those who ignore them. One of the most pervasive roles of law in modern societies is in supplying these regulatory or guidance standards.

Laws set standards for social interactions in complex society without which such interaction would be confusing at best and dangerous at worst. Legal regulations, for example, give us standard time, a uniform medium of monetary exchange and orderly use of the airwaves. They help protect the quality of our water and air, and help protect us from each other on the highways and in the air. They help us avoid consuming adulterated foods or drugs.

In performing its regulating functions, laws also establish minimum standards for performing jobs that are potentially dangerous to others' health, safety or welfare. Thus, one can only drive a car or airplane, handle certain hazardous materials, be a teacher, practice medicine, or sell certain kinds of property if he or she is officially licensed after having obtained specified knowledge and training or demonstrated particular skills.

A third type of regulatory law validates, as legally sanctioned or enforceable, private arrangements that meet specified standards. For a marriage to be legally valid, marriage partners must be a given age. Certain contracts and wills are legally enforceable only if they are in writing.

In evaluating the regulatory law all about them, students can see law employed effectively and ineffectively. Given conduct may have too much or too little legal regulation. Legal regulation can be sound or unsound and well or poorly administered.

Law is Necessary to Deter and Discipline Certain Unacceptable, Anti-Social Conduct

People kill people. People steal others' property and purposefully hurt others. All members of society are not of good will at all times. People engage in anti-social conduct that wilfully and unreasonably threatens other persons or property. Perhaps law's most familiar function is identifying unacceptable conduct and setting penalties so as to discourage people from engaging in it.

Law thus functions to protect citizens from the misconduct of other citizens. It seeks to set punishments that deter anti-social conduct by making the likely consequences of engaging in the conduct less attractive than the fruits of engaging in it. This kind of law also seeks to protect us from bad actors by isolating them or rehabilitating them. Official

sanctions for anti-social conduct may function as a substitute for retribution or revenge to which victims of crimes may be disposed, and which may involve further unacceptable conduct.

The penal law function is an interesting contrast to other essential social functions of law. If people always acted in good faith, only the criminal law function would cease to be necessary.

The interplay between penal law and other non-legal social ordering forces is dramatic. The task of minimizing anti-social conduct gets a big assist from notions of common morality and religious convictions.

Penal law also provides dramatic illustrations of critical roles of individuals if law is to operate effectively. Without widespread citizen support in condemning conduct that is deemed criminal, officials' effectiveness in applying criminal law is seriously impaired.

Law is Necessary to Protect the Governed from Overreaching by Public Officials

Laws are necessary if critical social functions are to be performed. As laws are not self-making or self-applying, a variety of officials (legislators, regulators, judges, police) are needed to make, interpret, apply and enforce laws. The mere creation of officials with power to exercise control of private citizens presents the potential for abuse of power and loss of freedom.

In a free society (one "of laws" and not "of men") a necessary function of law is to limit the power and activity of officials. Even officials with good intentions pose a threat to the citizenry unless laws restrain them. Such constitutional or constitutive laws define, restrict and limit the authority of officials as to what are the proper subjects for official action; who among officials is empowered to perform particular tasks; and how official action must be carried out.

The United States Constitution is a modern model of constitutive law that has worked over a sustained period to protect a citizenry from overreaching by its officials and to preserve basic freedoms for American citizens. This law declares certain subject areas out of bounds for lawmaking. Ex post facto laws are prohibited as are laws establishing religion or restricting free speech, press, religion, assembly or the right to petition government.

Similarly, our Constitution by separating powers between independent branches of government and dividing powers with the states establishes restraints and limits on who can properly exercise powers of officials -- powers which, if abused, jeopardize freedoms of the citizenry. So functionally viewed, the traditional treatment of the constitutional structure of government may take on more meaning.

Lastly, our constitutional law restricts how legal officials may go about their jobs. They may not take life, liberty or property without due process of law. They must apply

the law with equal protection to all citizens. They cannot legally, among other things, put a citizen twice in jeopardy for the same crime, compel him to bear witness against himself, invade his privacy without probable cause, or punish him cruelly.

Students should consider what are the values that are being secured by such restrictions on officials. So promoting liberty, private property and fairness is not without social cost of its own. Students should weigh the cost in terms of inefficiency of administration of criminal law or the threat to order that results from such constitutional restriction.

In a free society there is no more essential role of private citizens than keeping their officials within the boundaries established by constitutional limitations. Who officiates over the officials? In a free society the answer, in significant part, is private citizens exercising their constitutional rights. If citizens do not exercise their rights to speak out against officials or vote them out of office when officials overstep constitutional boundaries, those constitutional protections of liberty will not work; they are not self-executing.

The four functions of law discussed above (dispute resolution, guidance, deterrence of anti-social conduct and limitation of official action) are not the only functions of law that demonstrate the necessity of law to society as we know it. Professor Summers, in his text for undergraduate liberal study about law, adds law's functions or promoting human health,

reinforcing the family and ordering private ownership.[12/] There are others worthy of study.

B. How Law Works

AS LAW DEALS WITH SOCIAL NEEDS AND PROBLEMS, OFFICIALS AND PRIVATE CITIZENS USE A LIMITED NUMBER OF LEGAL TECHNIQUES OR TOOLS

Law can be viewed as a series of social resources, a number of mechanisms or tools, that can be applied to help solve social problems and perform social functions. Five distinct tools or techniques can be identified: the criminal law or penal technique, the lawsuit or grievance remedial technique, the regulatory technique, the public benefit technique, and the private arranging technique. Each of these legal tools has distinctive characteristics that are useful to identify. Each has distinct capacity to perform particular social functions. The roles of private citizens and public officials vary with each of these techniques in making law as well as in influencing, activating and operating the technique in our legal system. Each of these legal resources may be unsoundly applied because the wrong resource has been put to work or because law, in the given circumstance, does not have sufficient support of non-legal forces of social control.

12/ Summers, R. S., Law: Its Nature, Functions and Limits, supra, Chapters 6, 7 and 11.

Such an "instrumental" conception of law is an effective method for considering law's nature and functions in the social order as well as private individuals' and officials' roles in making law work. A survey or law's techniques provides insight into what law is and how it is used.13/

Law's five basic techniques or resources provide a systematic framework with which to investigate a number of things about law. Students can see concretely how law is put to work in many ways on a single social problem (e.g. highway safety, environmental pollution, public education or drug abuse) by looking at different ways that each tool is effectively or ineffectively employed on that problem.

The legal techniques grid provides a ready means for analysis of the varying roles of private citizens and public officials in making and applying law of each separate legal technique. It also is a framework for systematic study of the interrelationship of law and non-legal social ordering resources such as public opinion, custom, economic self-interest, interests in self-preservation and public morality.

Separation of powers analysis provides a scheme that is traditionally utilized in teaching about the operation of American government. The alternative "instrumental" approach

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13/ See Summers, R.S., "The Technique Element in Law," 59 California Law Review, 753 (1971).

proposes an analysis of the legal system through a systematic survey of a limited number of distinct legal techniques.

The primary rationale for separation of powers by our forefathers was that each branch of government would serve as a check on the others, thus protecting the governed from the potential oppression of too great a concentration of governmental power. As discussed earlier in this paper, American history illustrates that the authors of the United States Constitution were perceptive in designing a government of separate powers to help protect the governed from the government. Yet, the separation of power scheme is commonly used for an additional pedagogical purpose--to view how government operates. Students traditionally learn that the legislative branch makes and changes laws; the executive branch enforces laws; and the judicial branch interprets and applies laws. Tidy and simple as this scheme may be, it is not an accurate and informative way to analyze the operation of American government. However, the legal technique scheme takes into account the available tools or techniques of law that both individuals and government use to solve social problems.

A survey of the operation of various legal techniques presents a more refined picture of what government officials of various kinds do than of the analysis of the government branch by branch. Separation of powers notions in this context suggests that law is made by one branch of government, enforced by another, and interpreted by yet another. This simply is not

accurate. While the power to legislate rests exclusively with the legislature, in a very real sense courts, administrative officials, and the executive make and change law in performance of their constituted duties. Judges and administrative officials share a major part of the executive's law enforcement functions. Laws are interpreted and applied in conflict situations by administrators as well as judges.

Separation of powers analysis has a serious gap. The entire administrative-regulatory branch of government is missing. These government officials, whose positions are normally created by the legislature and filled by the executive, are neither part of the legislative, executive, or judicial branch.

Separation of powers analysis unrealistically separates in a rigid way the structure of government from the operation of law. The government is not only structured by law, but law provides procedures by which governments operate. On the other hand, the legal techniques analysis turns the focus from mere structure of government to analysis of structure in the context of operational processes.

The Criminal Law Or Penal Technique Or Tool Helps Discourage Antisocial Conduct By Prohibiting It And Punishing It When It Occurs

There are a number of special characteristics that distinguish the penal technique as it seeks to discourage

socially unacceptable conduct by punishing it. The vast majority of law's operations concern themselves with wholesome conduct -- but not the penal technique. This legal tool, unlike any other, is concerned with conduct that is widely recognized as wrong. The legislature typically determines what conduct will not be tolerated and labels it as criminal. Normally, there is a great overlap between criminality and perceptions of immorality. Where there is not, the penal technique stands little chance of operating effectively and sometimes operates at great cost in terms of loss of public support.

In operation of the penal tool, crimes are linked with punishments so as to deter the identified antisocial conduct. Application and enforcement of this technique involves numerous special officials such as police, prosecutors, public defenders, wardens and parole officers. Yet, private citizens have very important roles if this tool is to do its job well. Citizens must support the condemnation of the prohibited action by reporting crime and acting as jurors and witnesses. Because this legal tool deals with life, liberty and property of those accused of crimes, elaborate special procedures exist for preventing official errors or abuses in the process of administering this technique.

The Private Remedy Or Lawsuit Technique Or Tool Helps Provide Regress When A Citizen Feels Another Citizen Or Official Has Wrongfully Harmed Him Or Her And The Dispute Cannot Otherwise Be Resolved

The remedial or lawsuit tool provides an impartial third party in the form of a court to deal with private grievances or resolve disputes when disputants cannot do so themselves. This legal tool is initiated almost exclusively by private individuals. The remedy involved is typically the award of money damages or an order directing someone to do or cease doing something. The outcome of the dispute resolution process is enforceable by the court.

The private remedy technique often comes into play when legal arrangements between private parties break down, but it can also involve grievances between a private party and an official. The judicial process of resolving disputes is complex and more time consuming and expensive than most alternative methods of dispute resolution.

The Regulatory Technique or Tool Provides Standards, Guidance and Coordination of Wholesome Activity to Promote Health, Order, Safety, and Efficiency

Most of the activity that law regulates is not the immoral behavior that the penal technique concerns itself with. The regulatory technique provides guidance in wholesome, everyday activity. Regulatory programs are normally established by legislators with actual regulatory standards being made and carried out by expert administrative officials in a variety of fields. Regulatory standards are in large part self applied, but are backed up with official sanctions where necessary. Disputes

that arise concerning application of regulatory standards are usually resolved by the grievance remedial technique.

The Public Benefit Tool or Technique Involves Raising Revenues and Distribution of Benefits of a Variety of Kinds to the Public

When we live together in a complex society, there are certain services that, as a practical matter, are most effectively provided by government at some level. The public provision of such benefits is in significant part ordered and carried out by law and legal processes.

Law's public benefit tool has both a cost assessment side (usually taxes) and a benefit distribution side. The benefits in question are ordinarily perceived as essentials, the distribution of which by means of private arrangement is impossible or impracticable. The nature of national defense or penal law enforcement is such that these can only be provided for through a public effort. While education of the populace in a modern society conceivably could be left to private arrangements, the practical difficulties of doing without a public school system would be monumental.

The public benefits that are part of law's public benefit technique are widely varied: armed forces, schools, highways, welfare, direct subsidies to businesses, retirement benefits, law enforcement, mails, recreational facilities and space exploration to name a few. Some, more than others, of these are necessarily left to the public benefit technique. Some, more than others, are essential.

Activities of the public benefit tool are ordinarily authorized by the legislature which also assesses costs to underwrite the benefits, through taxation. Public benefit programs are carried out by a wide variety of public officials including judges, police and a multitude of administrative officials such as tax collectors and education commissioners. Private citizens are employed in vast numbers to deliver the products of the public benefit technique as, for example, soldiers, road builders, teachers, and welfare workers. By far, governments or public agencies at various levels are the largest employers in our society.

The Private Arranging Technique Or Tool Validates, Facilitates And Enforces Arrangements Between Private Citizens

Our legal system leaves a great many matters to private decisions, private arrangements and private administration. Private activities are carried on by individuals, groups, and organized bodies of different kinds. Private social arrangements are highly varied including such things as marriage, wills, contracts, property transfers, religious affiliations, business associations, unions, charitable organizations and social clubs.

The prime thrust of these arrangements is that they enable private citizens to realize things for themselves by themselves. Private parties determine the content of these arrangements and generally administer the arrangements they create. Yet law plays important roles in these private arrangements as law's private arranging tool works.

Societies use law as an instrument to facilitate and effectuate these private arrangements in three primary ways. Law grants citizens legal power to create the relevant kinds of private arrangements, for example a marriage, a will, a contract or a corporation. Legal "rules of validation" specify steps to be taken if legal significance is to be accorded the private arrangement. Then, law accords varied forms of significance once these validating steps are taken. Such forms of legal significance include for example, "bindingness" (for a will), recognized status (for marriage), remedies for departure (for a contract), imposition of duties (child support), and qualification for a benefit (tax exemption).

When private arrangements break down, the lawsuit/remedial tool or technique is generally available to provide redress.

C. Evaluating Legal Process

LEGAL PROCESSES -- HOW LAW DOES WHAT IT DOES -- ARE WORTHY OF QUALITATIVE EVALUATION ACCORDING TO CRITERIA APART FROM THE RESULTS THE LEGAL PROCESSES ARE APT TO PRODUCE

> "The method . . . by which an end is obtained may be of more consequence than the end itself."
>
> Maine

People are inclined to evaluate social interaction, including the operation of law, solely in terms of outcomes. We are result-oriented: "All's well that ends well."

When it comes to the operation of a legal system, outcomes are not the only things subject to qualitative evaluation. We can judge the "goodness" or "fairness" of the processes by which a legal system makes and administers laws, apart from results. A sound law might be made by executive fiat rather than by representative majority vote. On evaluation, the outcome is satisfactory, but this lawmaking process is still objectionable. A guilty suspect may be convicted on the basis of a confession secured by torture. The outcome is again satisfactory, but evaluation of this process of administering laws raises objections. Defects in lawmaking and law-administering processes are probably as important a source of injustice in the operation of a legal system as any. Furthermore, when the law is criticized on the basis of soundness, reasonableness, or fairness, more often than not, the criticism goes to how law went about something, not its end result.

Evaluation of the merit of something based not only on the results it produces but also on how it gets to those results, carries over to all kinds of social institutions and relations -- friendships, families, ball teams, churches, and classrooms to name a few. Just as with law, with each of these: "It is not only whether you win or lose [the result] it is how you play the game [the process] that 'counts' [is subject to normative evaluation]."

If students are intelligently to criticize the legal system or to seek to improve it by changing what needs improvement, they need to be prepared to evaluate legal processes as well as results. Such study may better prepare them to criticize and to change non-legal parts of the society in which they live.

Legal processes can be systematically evaluated by identifying discrete criteria by which the qualitative merit of the legal process can be judged apart from the merit of the results the process is apt to produce. Such criteria or "process values" include such notions as participation, impartiality, rational deliberation, consistency and correction. In studying lawmaking and law administering one can draw conclusions about the quality of our legal system in action by evaluating how it measures up based on such process values.

Legal Processes Can Be Judged By The Extent To Which They Appropriately Provide For Participation By Those Affected

The process value of providing appropriate participation by the governed is related to the notion of "government by the people." This kind of an appropriate "say" in the legislative lawmaking process starts in our legal system with provision for a representative legislative body that is selected by the vote of the governed. From the perspective of evaluating legal processes on the basis of opportunity for appropriate participation by those affected, students can address more perceptively and

critically such familiar subjects as the role of private interest groups in our government, the high cost of running for office, reapportionment, the right to an "opportunity for a hearing" before being adversely effected by legal action, the right to confront one's accusers, and the right to legal counsel.

Legal Processes Can Be Judged By The Extent To Which They Operate Impartially Or Free From Improper Or Undue Influences

Regardless of whether some extraneous influence in a given circumstance has an impact on a result, processes are subject to evaluation based on the extent to which they are designed to avoid such influences. When lawmaking or law administering takes place in circumstances where those acting are subject to influences unrelated to the merits of the task at hand, the legal process can properly be criticized. This is so even if in the given circumstance the undue influence does not take hold and dictate the outcome. Quality legal processes are designed to be impartial -- free from undue influence. Some laws themselves seek to foster impartiality in legal processes. Examples include laws making bribery a crime, requiring disclosure of lobbying, prohibiting conflicts of interest, requiring financial disclosure from certain public officials, and disqualifying judges and jurors from sitting in cases where they know the litigants.

Legal Processes Can Be Judged By The Extent To Which They Provide Opportunity For Rational Deliberation, Free From Coercion

Law making and law administering processes can be criticized if they fail to allow the time and means to discover relevant facts and promote the application of reason to those facts. Such concerns result in both legislators and litigants having the power to bring people before them to testify. Some legislative bodies have elaborate rules for passing bills, such as multiple readings, publication and acceptance of proposed legislation by a second legislative body.

Legal Processes Can Be Judged By The Extent To Which They Assure Similar Treatment In Similar Circumstances

Regardless of whether a given outcome is sound, something is wrong with legal processes that allow for inconsistent treatment of cases that are essentially the same. Assuming one favors capital punishment, he is likely to find fault with a legal process that executes only capital offenders of a particular race or sex. The requirement of "equal protection" to all citizens under the law and the doctrine of binding judicial precedent are responsive to the process value of consistency.

Legal Processes Can Be Judged By The Extent To Which They Allow For Correction Of Error

As human beings are fallible, so potentially are the laws they make and the processes by which laws are administered. Legal processes themselves can be evaluated based on the extent to which they allow for correcting mistakes. In this context in our legal system laws and regulations are subject to judicial review. Judicial decisions are appealable to higher courts. Trial judges can be asked to reconsider certain rulings they make. Criminal juries are permitted to ignore the law and acquit with impunity regardless of the mandate of the criminal law. Judges can override juries, except with respect to acquittals. In part, in recognition of the fact that mistakes will be made in our legal system, our Constitution gives special protection to speech and press that are critical of officials.

D. Limits of Law

LAW BY ITS NATURE IS NOT OMNICOMPETENT, BUT IS INHERENTLY LIMITED IN ITS CAPACITY TO MEET SOCIAL OBJECTIVES

What is meant by "limits" of law? To say law is inherently "limited" goes beyond saying some laws are ill-conceived or poorly administered. Law might set the speed limit at ten or 110 miles per hour. An official who is illiterate or ten years old might be assigned by the law the task of licensing "fit" teachers. These would not be very good laws and may be limited in their capacity to meet their underlying objectives of

safe and effective highway transportation and quality education, respectively. But it is not something inherent in the nature of laws and societies in which they operate that precludes better laws on these subjects.

When considering "inherent" limits of law, the subject is limitations in law's capacity to meet objectives set for it, even when it is used effectively in the sense of sound content and processes. Because of the nature of law, society and human beings, some things are simply too much to expect reasonably from law -- even when it is working well.

Development of basic understandings about law's inherent limitations is important for at least two reasons. A realistic understanding of law's capacity should lessen unrealistic expectations from law. This, in turn, may reduce unnecessary disenchantment and cynicism in dealing with "the system." Young people who believe the legal system fails them should not arrive at that conclusion based on law's failure to measure up to standards which would not themselves be embraced by a citizenry better informed about the nature of law.

For today's students to be tomorrow's effective makers and users of law and designers of social improvements through legal change, a realistic set of expectations is a necessity. Free society depends on active participation and attitudes of constructive skepticism on the part of private citizens in dealing with law, legal authority and legal processes. That positive, active skepticism is born of an informed understanding

of the basic nature of law and legal process. A realistic appreciation of laws inherent limitations fosters that constructive skepticism that lies between the twin civic malignancies of apathy to one side and cynicism to the other.

A number of identifiable characteristics about law and legal processes help delineate several distinct "limits of law."

Law Is Limited In Its Capacity To Restrict Or Regulate Thoughts And Feelings As Opposed To Overt Actions

Humanistic commitment to fellow men; support of the institution of family; love of God and country. Few would take issue with the proposition that these are generally accepted social objectives reflecting widely shared social values. Law is utilized to promote such shared objectives and values. To the extent law undertakes such tasks by taking direct aim at thoughts, beliefs and feelings, it almost certainly will not be effective.

Laws which address overt actions related to these objectives and values may be viable: one shall not assault his neighbor; one is responsible for providing economic necessities to spouse and children; one must answer when called to defend his country. Laws cannot succeed at directly regulating the thoughts and feelings at the root of these values: one must love his neighbor, country or God; or respect the members of her family. Such laws are not only impossible to enforce, but any effort to this end is an assault on freedom of belief and thought which is

fundamentally offensive to any society with a humanistic or libertarian commitment.

Law Is Limited In Its Capacity To Operate Effectively When Not Supported By General Public Morality

For laws to be effective they must enjoy a certain measure of public support. Legal prohibitions of alcohol consumption, prayer in the schools, abortion, adultery, attempting suicide, gambling and driving on freeways not in excess of 55 miles per hour all are examples, in some measure, of laws that have not worked very well. In each example, there has been widespread lack of moral support in the general populace for the prohibition. Contrast these to consensus supporting prohibitions such as, do not steal or kill. The role of the populace in the operation of laws that prohibit activity is so pervasive that, without support of common morality, law in this realm is severely limited.

Law Is Limited In Its Capacity To Fashion Effective (Or Sometimes Even Appropriate) Remedies

When a citizen is aggrieved by the conduct of another, that citizen can turn to the courts and the law's remedial technique. This tool of law, in turn, may settle the parties' dispute by awarding a remedy to the party who has been wronged. Law's arsenal of remedies is, however, limited. A judgment for money is law's most common remedy. In some instances, the court

will order that action be taken or stopped. Beyond this, law runs out of solutions. In many cases these possibilities simply cannot effectively repair or compensate for the wrong that has been done. Legal remedies in some circumstances miss the mark by such a margin that a legal remedy for a legal wrong is not even appropriate. No legal remedy can effectively repair the damage to a victim who has been raped or purposefully disfigured, to the surviving loved one of a murder victim, or to the neglected child or abused spouse.

Law Is Limited In Its Capacity Simultaneously To Promote Widely Accepted Values In Circumstances Where Those Values Are In Conflict

Law frequently is faced with trying to promote competing social values. Accepted, fundamental values often are presented in circumstances where one value can be fostered by law's operation only at the expense of the other. Sometimes no ready compromise takes law off the horns of such a dilemma. When the "peaceful" exercise of free speech on an intensely unpopular subject threatens to insight a riot, law must choose between freedom and order; in the given circumstance, it cannot have both. The nature of value conflict itself routinely limits law's capacity to support fundamental values which law exists to promote.

Law Is Limited By The Fallibility Of Those Who Make And Administer It

If stupid legislators or lazy judges are selected, or if apathetic or cynical citizens will not actively participate in the operation of the legal system, the quality of what the system produces will be limited. To some extent the machinery of a legal system is "neutral" with the quality of its processes and results being limited by the skills and attitudes of those who operate it.

Law Is Limited By Its Capacity Accurately To Recreate Past Facts

In the judicial process of the penal and remedial techniques, law's capacity to produce meritorious outcomes is limited by its ability to determine past, relevant facts. Imperfections in human powers of perception and recall and, less frequently, dishonesty impair the judicial process of accurate fact finding. Frequently the judicial process is simply incapable of determining with certainty, for example, who crossed the double white line on the highway? What did the parties actually say when they reached a verbal agreement? Who pulled the trigger? Without certainty regarding essential, relevant facts, law is limited in its capacity to guaranty a meritorious outcome.

Law Is Limited By Its Lack Of Technical Or Other Complex Know How

Law's capacity in seeking to perform many basic social functions is limited by the state of human knowledge about those functions. Law seeks to promote health, but without knowledge of the cause of cancer, law's efforts will not be altogether successful. Law seeks to promote the family in a realm where something so rudimentary as a formula for "good parenting" defies definition. Enormous legal resources are committed to highway safety, yet the accident-proof auto and highway await future technical advances.

IV. Conclusion

Law is a resource for enriching future civics education that has hardly been tapped, notwithstanding two decades of a law-related education (LRE) movement. This is so because civics educators in the LRE arena have in significant part misfocused their efforts.

Instead of studying <u>about</u> law in general social studies education -- its nature, functions, limits and role in the social order -- LRE efforts have largely focused on particular laws or areas of law (constitutional law, business law, consumer law) as if those were ends in themselves for social studies or civics education. In any general sense, they are not. It is the broader view of where law fits in society and where private citizens and officials fit in the processes of law that offers

the potential to enrich civic education. The study about law and legal process offers, as so eloquently put in the charter to this Conference, to "help empower students to be knowledgable and effective decision-makers and participating citizens as adults."

Four main content areas about law are suggested as appropriate candidates for transplant from the discipline of law to civics: law's functional necessity; an instrumental approach to how law works; systematic evaluation of legal processes; and law's inherent limits. Other pedagogical schemes of addressing law and legal processes in the social order are possible.[14/] These might be built around themes that recur in the approach that is offered. The recurrent themes include:

-- Private citizens, as well as officials, have key roles to play in every aspect of the operation of law.

-- Law often works in combination with non-legal social ordering forces.

-- There are complex interrelationships between social values, on the one hand, and law and legal processes on the other.

-- There are complex interrelationships between law and social change.

14/ In Law: Its Nature, Functions and Limits, supra, Professor Summers, in addition to chapters examining each of law's five instrumental techniques, builds his study about law in the social order around seven basic social functions law helps perform: promoting human health; reinforcing the family; keeping the peace; protecting basic freedoms; securing equality of opportunity; ordering private ownership; and controlling persons in power.

-- Law is primarily facilitative, and only secondarily restrictive.

Such basic understandings about law need to take their place in the civics curriculum beside basic concepts from other humanistic disciplines like economics, political science and sociology. Until this happens, it may not be altogether realistic to expect today's students to attain the knowledge, attitudes and skills necessary to meet effectively the challenge of citizenship in a vital democracy in the next century.